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IN THE

Supreme Court of the United States

OCTOBER TERM, 1943.

No. 689

TAYLOR INSTRUMENT COMPANIES,
Petitioner,

vs.

FAWLEY-BROST COMPANY,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT AND BRIEF IN SUPPORT THEREOF.

EDWARD S. ROGERS,
WILLIAM T. WOODSON,
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PRESTON B. KAVANAGH,
Attorneys for Petitioner.

THE GUNTHORP-WARREN PRINTING COMPANY, 210 WEST JACKSON, CHICAGO

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PETITION FOR A WRIT OF CERTIORARI TO THE CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

To the Honorable, the Chief Justice of the United States, and the Associate Justices of the Supreme Court of the United States:

This is an application on behalf of TAYLOR INSTRUMENT COMPANIES, a New York corporation, of Rochester, New York, for a writ of certiorari to review a judgment of the Circuit Court of Appeals for the Seventh Circuit entered on November 15, 1943 reversing the District Court for the Northern District of Illinois, Eastern Division.

The opinion of the Circuit Court of Appeals is at page 428 of the record, and is reported in 139 Fed. (2d) 98. The opinion of the District Court is published in 56 U. S. P. Q. 213 and the judgment of the District Court is at page 409 of the record.

I.

Jurisdiction.

(a) Federal jurisdiction of the Courts below existed under the Copyright Act of 1909 (U. S. C. A. Title 17, Secs. 1-63) and the Trade Mark Acts of 1905 and 1920 (U. S. C. A. Title 15, Secs. 81-134).

(b) The jurisdiction of this Court is invoked under Sec. 240 of the Judicial Code, as amended by Act of Congress of February 13, 1925, 43 Stat. 938; U. S. C. A., Title 28, Sec. 347(a).

(c) This Court has never passed upon the question of copyright law presented in this case.

II.

The Questions Presented.

The questions are:

(1) The construction of Sec. 5(i) of the Copyright Act of 1909 (U. S. C. A. Title 17, Secs. 1-63). Whether, as the Circuit Court of Appeals held, copyrightable and duly copyrighted subject matter ceases to be such when it is used in a machine, and whether, when so used, it can be appropriated without license or liability;

(2) There is also involved the construction of the Trade Mark Acts of 1905 and 1920 (U. S. C. A. Title 15, Secs. 81-134). The question is whether the owner of a validly registered trade mark under these acts is protected against the use of it or of abbreviations of it applied without license by a competitor to identical goods.

Both these rights, secured by federal statutes, the District Court upheld and the Circuit Court of Appeals denied.

III.

Summary and Short Statement of the Matters Involved.

Petitioner makes charts for recording instruments such as recording thermometers used in dairies and in many industries where temperature, pressure and flow records are required. The compilation of such charts requires a high degree of care, skill and intellectual effort (Rec. 110-115). These charts are copyrighted by the petitioner, and are sold under the trade mark "Taylor."* This action was brought to enjoin respondent from using petitioner's registered trade mark and from copying petitioner's copyrighted charts for use in connection with recording thermometers. Petitioner's charts, which were the subject matter of the action, embody intellectual effort and were validly copyrighted by the petitioner as "Drawings of a Scientific or Technical Character" under Sec. 5(i) of the Copyright Act of 1909. The Register of Copyrights issued to the petitioner, copyright certificates for each chart sued upon.

The District Court found that petitioner's charts are proper copyright subject matter, that respondent's charts are copies of petitioner's charts and were copied therefrom without petitioner's permission; that this copying saved the respondent the labor and expense of computing and designing charts, and constituted infringement under the Copyright Act (Rec. 405-408).

---

* One of petitioner's copyrighted charts, No. O. P. 1599 (Exhibit B to the complaint) upon which the trade mark "Taylor" is displayed, and one of respondent's charts, No. T-OP 1599 (Exhibit C-2 to the complaint), which is a copy of petitioner's chart Exhibit B, both slightly reduced in size, are reproduced as an Appendix to this petition. It will be observed that respondent claims copyright for its chart.

The Circuit Court of Appeals did not disturb the District Court's findings, but reversed on the ground that the purpose of petitioner's charts is use, not explanation; that they are mechanical devices, protection of which belongs exclusively in the patent field.

Petitioner indicates the origin of its charts by applying its registered trade mark "Taylor" to them. The name "Taylor" has acquired a secondary meaning and indicates petitioner and petitioner's products only (Rec. 406). Respondent designates charts made by it, as "Taylor" or abbreviated "Tay" and "T". Petitioner contended that these acts infringe plaintiff's registered and common law trade mark "Taylor". The District Court so held.

Respondent passed off charts of its manufacture without explanation, upon orders for "Taylor" charts (Rec. 407). Petitioner contended that this was actionable passing off and unfair competition. The District Court so held.

Without disturbing the District Court's findings that the name "Taylor" had acquired a secondary meaning indicating petitioner and petitioner's products only, and its registration valid, that "Tay" and "T" are abbreviations of petitioner's trade mark and that respondent sold charts not coming from petitioner as "Taylor" charts, the Circuit Court of Appeals held that respondent had a right to describe its charts as "Taylor" and to mark them with the abbreviations "Tay" or "T". The reason assigned by the Court is that respondent's charts are replacement parts for petitioner's recording instruments.

IV.

Reasons Relied Upon for the Allowance of the Writ.

1. It is a matter of public importance that the owner of an original copyright work should be protected against piracy. The Circuit Court of Appeals has denied petitioner the protection which the Copyright Act gives.

2. Since the Copyright Act of 1909 the industry has copyrighted charts for recording instruments and have respected their competitors' copyrights. The Copyright Office has long accepted such charts for copyright and has accepted thousands of dollars as fees. The decision of the Circuit Court of Appeals holding them uncopyrightable has overturned a trade practice of long standing and the administrative interpretation of the law.

3. It is a matter of public importance that this Court determine the validity and scope of copyrights under Sec. 5(i) of the Copyright Act (Drawings of a Scientific or Technical Character). This question has never been passed upon by this Court.

4. It is a matter of public importance that registered trade marks should be protected against misuse.

5. It is a matter of public importance that statutes designed to protect copyrights and trade marks should be applied by the Courts so as to carry out the purpose of Congress in enacting them, in order that the rights conferred on the owners of copyrights and registrants of trade marks may be secured, and the remedies against infringement applied.

6. The decision of the Circuit Court of Appeals is in conflict with the proper application of Rule 52(a) of the Rules of Civil Procedure, which provides that:

> 'Findings of fact shall not be set aside unless clearly erroneous * * *.''

Petitioner asks this Court to grant a writ of certiorari to the Circuit Court of Appeals for the Seventh Circuit to review its decision in this case.

Respectfully submitted,

EDWARD S. ROGERS,
WILLIAM T. WOODSON,
KARL D. LOOS,
PRESTON B. KAVANAGH,
Attorneys for Petitioner

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

The Opinions Below.

The opinion of the District Court is published in 56 U. S. P. Q. 213, the opinion of the Circuit Court of Appeals is at page 428 of the record. It is reported in 139 Fed. (2d) 98.

Jurisdiction.

The petition sets forth, on page 2, the grounds on which jurisdiction is invoked.

Statement of the Case.

The petition sets forth an outline of the facts on pages 3 and 4, under the caption—"Summary and Short Statement of the Matters Involved". The facts are fully and accurately reported in the District Court's findings of fact and conclusions of law, which were not disturbed by the Circuit Court of Appeals. These findings and conclusions can be accepted as a complete statement of the facts. They are at pages 405-408 of the record and are as follows:

FINDINGS OF FACT.

1. Plaintiff, Taylor Instrument Companies, is a New York corporation with its principal office in Rochester, New York.

2. Defendant, Fawley-Brost Company, is an Illinois corporation with its principal office in Chicago, Illinois.

3. This is an action between citizens of different states wherein the amount in controversy exceeds, exclusive of interest and costs, the sum of Three Thousand Dollars ($3,000.00). The action also arises under the Trade Mark Laws of the United States (Title 15

U. S. C. A., Secs. 81-108) and the Copyright Laws of the United States (Title 17 U. S. C. A., Secs. 1-43).

4. Plaintiff is engaged in the manufacture and sale of scientific instruments for indicating, recording and controlling temperature, pressure, flow, liquid level and humidity, weather barometers, and other kindred types of instruments. Plaintiff and its predecessors have been engaged in such business since about the year 1851.

5. Plaintiff is also engaged in the manufacture and sale of charts used in connection with temperature and pressure recording instruments.

6. Plaintiff has a world-wide business in the sale of its products and the annual sales are in excess of Five Million Dollars ($5,000,000.00).

7. The annual volume of plaintiff's sales of charts for recording instruments is in excess of ten million (10,000,000) charts.

8. Plaintiff's sales of said charts in the Chicago trade territory for the years 1941 and 1942 were approximately one and one-half million (1,500,000) charts annually.

9. Plaintiff's products are extensively advertised.

10. Plaintiff applies the name "Taylor" to its instruments and charts as the trade mark therefor, and the name "Taylor" is the means by which the trade and public identify the plaintiff's products and distinguish them from similar products of others.

11. The name "Taylor" in connection with recording thermometers and such instruments, and in connection with charts for use in connection with recording instruments, has acquired a secondary meaning in that it is recognized by the trade and public as indicating the plaintiff and plaintiff's products only.

12. Plaintiff registered its trade mark "Taylor" in the United States Patent Office for measuring and scientific appliances on April 26, 1921, No. 141,813.

Plaintiff registered its trade mark "Taylor" in the United States Patent Office for charts on May 29, 1934, No. 313,523.

Plaintiff registered its trade mark "Taylor" in the United States Patent Office for altimeters and a large number of other measuring and scientific appliances on July 10, 1934, No. 314,945.

These registrations are valid and subsisting and the plaintiff is the owner of the trade mark "Taylor" and the aforesaid registrations.

13. Plaintiff's charts, which are the subject matter of this action, Exs. B and B-3 to B-19, inclusive, were duly copyrighted by the plaintiff as drawings of a scientific or technical character by publication in the United States with the proper statutory notices of copyright on each copy. Copies of said charts were promptly deposited with the Register of Copyrights with the statutory fees, together with applications for copyright registrations, whereupon the Register of Copyrights issued to the plaintiff copyright certificates for said charts, Exs. B-1 and B-3a to B-19a, under Sec. 5(i) of the Copyright Act of 1909.

14. Plaintiff, in order further to identify the origin of its charts, applies to said charts arbitrary code numbers.

15. Defendant, Fawley-Brost Company, is engaged in the manufacture and sale of charts for use in connection with recording and measuring instruments such as are manufactured by the plaintiff.

16. Defendant uses, without permission from the plaintiff, in connection with the advertising and sale of its charts, plaintiff's trade mark "Taylor" and the abbreviations thereof, "Tay" and "T", and defendant displays upon some of its charts the letter "T".

17. Defendant, without permission from the plaintiff, displays upon its charts, Exs. C-2 to C-19, inclusive, and its price lists, plaintiff's arbitrary code numbers, which defendant generally prefixes by the numerals "10" or "12".

18. Plaintiff's agents placed written orders for "Taylor charts" with the defendant; said orders were filled with defendant's merchandise.

19. Defendant's charts, Exs. C-2 to C-19, inclusive, are copies of plaintiff's charts, Exs. B and B-3 to B-19, inclusive, respectively, and were copied therefrom without plaintiff's permission.

20. Defendant, prior to the filing of this action, copyrighted some of its charts, namely, Exs. C-2 and L-1, by publishing them with the statutory copyright notice, and defendant displays a copyright notice on the boxes on which it sells most of its charts.

21. The use of the name "Taylor" and the abbreviations thereof, "Tay" and "T", by the defendant indicates an intention on the part of the defendant to gain something from plaintiff's reputation and its advertising, so that it could compete unfairly with the plaintiff and to give defendant's products a salability they would not otherwise have.

22. The copying by defendant of plaintiff's charts saves the defendant labor and expense of computing and designing the charts which it manufactures and sells.

Conclusions of Law.

1. The trade mark "Taylor" is valid and is owned by the plaintiff.

2. The letters "Tay" and "T" are abbreviations of the trade mark "Taylor" and are a colorable imitation of plaintiff's registered trade mark "Taylor".

3. Plaintiff's registrations of the trade mark "Taylor" in the United States Patent Office are valid and subsisting.

4. The use by the defendant of the name "Taylor" and the abbreviations thereof "Tay" and "T", by the defendant constitutes a colorable imitation of and an infringement of plaintiff's registered trade mark "Taylor".

5. Passing off by defendant of its charts upon orders for Taylor charts constitutes unfair competition with the plaintiff.

6. Plaintiff's charts are proper copyrightable subject matter.

7. Plaintiff's copyrights of its charts, Exs. B and B-3 to B-19, inclusive, are valid and subsisting, and the plaintiff is the owner of said copyrights.

8. The copying by the defendant of plaintiff's copyrighted charts constitutes copyright infringement under the Copyright Act.

9. The use by the defendant of plaintiff's arbitrary code numbers for its charts constitutes unfair competition with the plaintiff.

10. The defendant's counterclaim is without merit and should be dismissed.

11. Plaintiff is entitled to an accounting under the Federal Trade Mark and Copyright Statutes for the damages sustained by the plaintiff and the profits made by the defendant in the use of plaintiff's registered trade mark and the copying of plaintiff's copyrighted charts.

12. Plaintiff is entitled to its costs.

The judgment of the District Court enjoining the defendant from its acts of trade mark infringement, unfair competition and copyright infringement is at pages 409-410 of the record.

SPECIFICATION OF ERRORS.

1. That the Circuit Court of Appeals for the Seventh Judicial Circuit denied the petitioner the protection which the Copyright Act confers.

2. That the Court of Appeals denied the petitioner the protection which the federal Trade Mark Statutes confer.

3. That the Court of Appeals ignored Sec. 5(i) of the Copyright Act under which petitioner's charts are copyrighted.

4. That the Court of Appeals erroneously reversed the District Court, relying upon copyright cases decided before the Copyright Act of 1909.

5. That the decision holding that since petitioner's charts are things of use, they are not entitled to copyright protection is in conflict with the rule announced by this Court in *Bleistein* v. *Donaldson Lithographing Company*, 188 U. S. 239.

6. That the decision denying petitioner the protection afforded by the federal Trade Mark Statutes is in conflict with *Thaddeus Davids Co.* v. *Davids*, 233 U. S. 461, and *Armstrong Paint and Varnish Works* v. *Nu-Enamel Corporation*, 305 U. S. 315.

7. That the decision is in conflict with the proper application of Rule 52(a) of the Rules of Civil Procedure, which provides that:

> "Findings of fact shall not be set aside unless clearly erroneous * * *."

ARGUMENT.

The copyright question presented has never been passed upon by this Court, or, so far as we know, by any Circuit Court of Appeals except in this case by the Circuit Court of Appeals of the Seventh Circuit. Briefly, it is whether copyrightable subject matter, duly copyrighted under an express provision of the statute, ceases to be such when used in a machine.

There is no doubt that the result of the work involved in the preparation of petitioner's charts is copyrightable. Similar computations, such as tables of logarithms, mathematical tables, and the like have always been protected. (*Bleistein* v. *Donaldson Lithographing Company,* 188 U. S. 239, 250.)

The Circuit Court of Appeals did not hold the District Court's findings to be "clearly erroneous" and did not set them aside, so it must be accepted as a fact that petitioner's charts are copyrightable and that the provisions of the copyright statute—publication with the notice, and deposit of copies were complied with. The Court held, however, that since the copyrighted charts were used as the basis of a record in a recording instrument, they became a part of that instrument and hence incapable of copyright.

This question has never been decided by this Court and it is important that it should be. For many years producers of recording instruments and charts used in them have been copyrighting these charts as "Drawings of a Scientific and Technical Character" under Sec. 5(i) of the Copyright Act (Rec. 348-375). Respondent itself has placed the notice "Copyright by Fawley-Brost Company" on charts it sells, including those copied from petitioner's

(Rec. 189, 190, 395, 396). For thirty years the Copyright Office has been accepting charts like these for copyright, taking the statutory fees and issuing copyright certificates on them (Rec. 348-375). There are thousands of copyrights on such charts which the industry as a whole, petitioner and its competitors have been taking out and the Copyright Office has accepted as representing copyright subject matter.* These copyrights have been respected by the rival makers of recording instruments. In holding these charts not susceptible of copyright, the Circuit Court of Appeals has upset the universal custom of the trade and the administrative interpretation of the Copyright Act.

So far as we know, there has never been a decision of this Court—or indeed of any court—involving this section of the Act. With the increase in the use of measuring instruments and charts to record their readings, the question has become increasingly important. Wherever temperature and flow controls are required, these instruments are used with charts, without which no record could be made. Unless the chart itself and the calculations embodied in it are completely accurate, the record would be useless. These charts are universally used in the dairy industry, in such industries as the manufacture of rubber and oil, and in chemical laboratories.

The preparation of the charts requires engineering and technical skill of a high order. Each separate line and curve involves a complex mathematical calculation (Rec. 110-115). The respondent, instead of making its own calculations, making its own tables and plotting its own curves, slavishly copied the charts compiled and copyrighted by petitioner (Rec. 123, 124, 399). In doing this, as the District Court held, respondent saved itself the labor and expense of making its own calculations (Rec. 408).

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* Public records of the Copyright Office confirm this statement.

Respondent's copying of petitioner's charts was found as a fact, indeed it was admitted, but the Circuit Court of Appeals held that because these charts were used in recording instruments, respondent's appropriation of petitioner's work was legitimate.

There is no question of patent infringement in the case, but we submit that the Court below confused patents and copyrights and did not appreciate the difference between authorship, which is what the Copyright Act embraces, and invention, the field covered by the patent statutes. Authorship is intellectual effort on subject matter resulting in a writing of some sort. Authorship does not require imagination or fancy. The compilers of what Charles Lamb once called "things in book's clothing", road books, directories, time tables, mathematical tables, catalogues, and annotations, are authors from the standpoint of copyright law. Any writing that involves industry, selection, care, discrimination, and the avoidance of error is copyrightable subject matter. Any number of people may work on the same subject matter, and if each is accurate, the results will be identical. Each is an author entitled to copyright the result of his labor and to be protected against the copying of his work by others (*Bleistein* v. *Donaldson Lithographing Company*, 188 U. S. 239, 249.) They, as has been said, "must count the milestones for themselves". In the case of a patent, it is necessary to create something that did not exist before. We need not, in this case, discuss the much disputed question whether invention should be considered objectively or subjectively, because it is well settled that authorship is something very different.

We suggest that the Circuit Court of Appeals did not perceive the difference between the two. But the fundamental error into which, it seems to us, the Court fell was in holding that copyrightable and copyrighted subject mat-

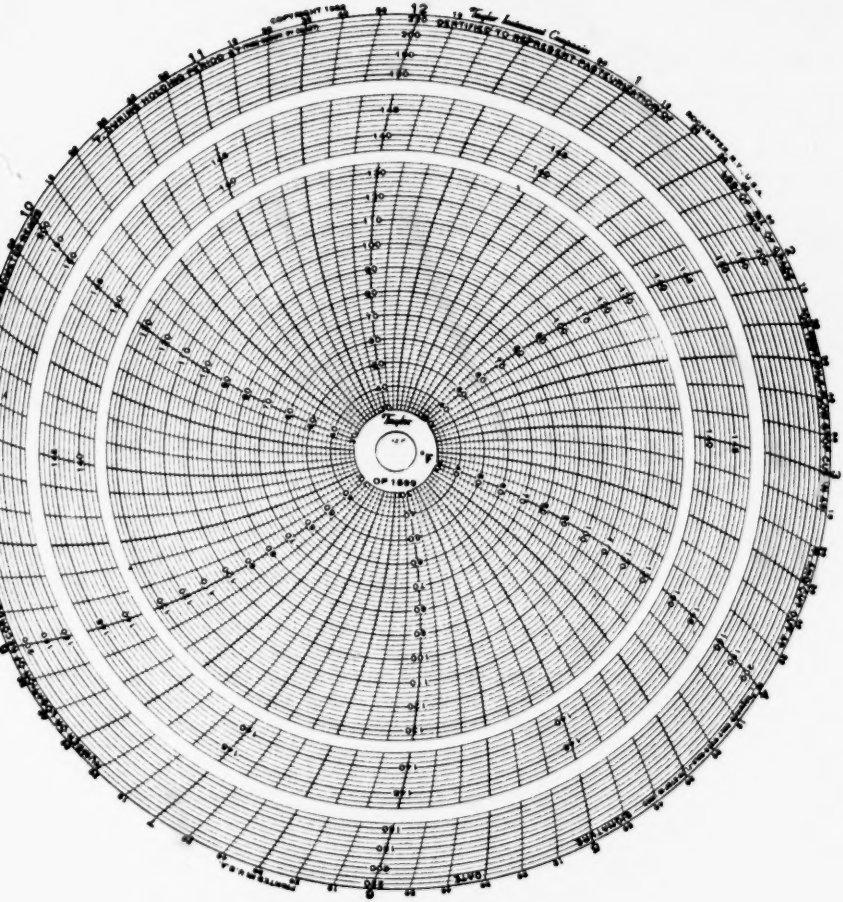
ter ceases to be such when used in a machine, and in accepting respondent's argument below that petitioner's charts are not copyrightable because they are of practical use. This, we submit, conflicts with the rule laid down in *Bleistein* v. *Donaldson Lithographing Company*, 188 U. S. 239, 251.

The Court relied on certain cases, decided before the enactment of the Copyright Act of 1909 and English decisions under a wholly different statute. It was agreed by both sides that the case is one of first impression. It is, we believe, of sufficient general importance for this Court to pass upon it.

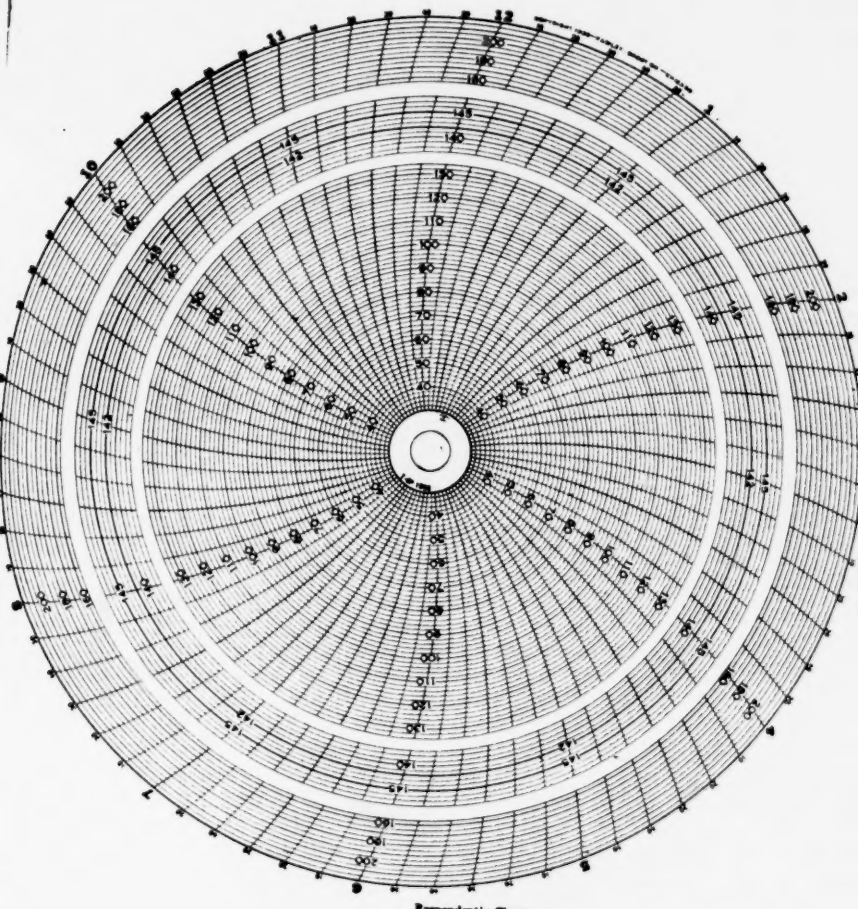
Respectfully submitted,

EDWARD S. ROGERS,
WILLIAM T. WOODSON,
KARL D. LOOS,
PRESTON B. KAVANAGH,
Attorneys for Petitioner.

APPENDIX.



Petitioned's Chart
(Plaintiff's Exhibit B to the Complaint).



Respondent's Chart
(Plaintiff's Exhibit C-2 to the Complaint).

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ANSWER
TO THE PETITION FOR A WRIT OF CERTIORARI TO THE CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT

and

BRIEF
ADVOCATING THAT CERTIORARI BE DENIED.

ALBERT I. KEGAN,
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THE GUNTHORP-WARREN PRINTING COMPANY, 210 WEST JACKSON, CHICAGO

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TAYLOR INSTRUMENT COMPANIES,
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Respondent.

ANSWER TO THE PETITION FOR A WRIT OF CERTIORARI TO THE CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

To the Honorable, the Chief Justice of the United States, and the Associate Justices of the Supreme Court of the United States:

I.

The Questions Presented.

Petitioner fails to state the real questions raised by this case. They are:

(1) Does the copyright law empower the vendor of a machine to require that supplies essential to the operation

thereof, and rapidly consumed thereby, be purchased solely from it?

(a) May a rapidly consumed mechanical element of a machine be monopolized by *copyright*, under sections 4 and 5(i) of the Copyright Act?

(b) If so, does the purchase of the machine carry with it an equitable license entitling the owner, or his agent, to copy such perishable mechanical element, in order to keep the machine in operation?

(2) May the Trade-Mark Act of 1920 be used to effect a total restraint of trade in replacement parts, by preventing vendors of such parts from designating the machines for which the parts are destined?

The Circuit Court of Appeals answered question (1)(a) in the negative (R. 432), without expressly passing upon questions (1) and (1)(b). It answered question (2) in the negative (R. 434).

II.

Summary and Short Statement of the Matters Involved.

The "charts" in suit are indispensable mechanical elements of the machines manufactured by petitioner (R. 432). They are consumed in large quantities by the operation of the machine. The alleged "authorship" of petitioner and the *amici curiae* consists solely in adjusting the spacing of the lines on these charts to correspond with the dimensions of the interdependent machinery. This is a necessary step in designing the machine, and is added into the cost of the machine. It is commercially impossible for an independent printer to redesign and recalibrate the entire machine as a prerequisite to printing the charts therefor. If competition is to exist, the printer must be free to copy the worn out chart brought to him by the owner of the machine. Petitioner is using the copyright claims in

suit to force purchasers of its machines to buy replacement supplies therefor solely from it. This is an affront to the public policy of the Antitrust Laws. If the Copyright Act can be used for this purpose, then it nullifies all the decisions of this Court condemning schemes for monopolizing the sale of unpatented parts and supplies.

Respondent advertises that it manufactures charts to fit Taylor instruments of specified model numbers. It prints a style number on each chart, and three of these style numbers contain the letter "T" as a part thereof. Other instrument manufacturers print the letter "T" upon charts which cannot be used in machines of Taylor make.[1] Petitioner never prints the letter "T" upon any of its merchandise, and has no trade-mark upon that letter of the alphabet. Petitioner nevertheless contends that the foregoing conduct infringes its trade-mark, which consists of the common surname "Taylor" written as an entity in a particular style of flowing script. In the courts below, petitioner also sought to prevent respondent from referring to the style numbers which petitioner employs to distinguish its various machine models from each other. Respondent contended that petitioner was attempting to stifle legitimate competition in replacement parts and supplies, by preventing petitioner's competitors from designating the equipment for which their wares were destined (R. 16-17). The Circuit Court of Appeals held that "the authorities are rather clear * * * that defendant * * * was acting within its rights" (R. 434).

1. Cf. brief of The Brown Instrument Co., p. 5.

III.

Reasons Urged for Denying Certiorari.

1. Where the decision below is manifestly correct, and embodied in a sound, well reasoned opinion, it should not be reviewed merely because the issues are of broad public importance, and the case is one of first impression.

2. The decision of the Circuit Court of Appeals is in complete harmony with the public policy pronounced by this Court.

3. The decision below settles the law sufficiently to advise the public, the Register of Copyrights, and chart manufacturers of their respective rights and duties.

Respondent asks this Court to deny certiorari.

Respectfully,

FAWLEY-BROST COMPANY,

By ALBERT I. KEGAN,

ESTHER O. KEGAN,

Its Attorneys.

RESPONDENT'S BRIEF ADVOCATING THAT CERTIORARI BE DENIED.

The Opinions Below.

Petitioner relies heavily upon the District Court, and asserts that the Circuit Court of Appeals did not understand the issues. In this connection, the opinion of the District Court is illuminating. It appears at page 404 of the record,—which citation was omitted by petitioner.

Statement of the Case.

The findings of fact, conclusions of law, and judgment of the District Court, which petitioner sets forth at length, were prepared by it for the signature of the District Court. They are no substitute for the record evidence; in fact, they are clearly contrary thereto. The case before this Court is concisely stated herein, at pages 2 and 3, *ante*.

Argument.

While the copyrightability of instrument charts has never been considered by this Court, we submit that the issue is controlled by the rule enunciated in *Baker* v. *Selden*, 101 U. S. 99 (1879). Selden's ledger sheets presented an original arrangement of material, but this Court held that they were not copyrightable because they were intended to be used as physical objects to be written upon. Petitioner's charts are used as physical objects, namely thermometer dials; and are written upon by the recording mechanism which cooperates therewith.

The enactment of the Copyright Act of 1909 (17 U. S. C., Secs. 1-63) did not overrule the law of *Baker* v. *Selden*. Petitioner contends that cases decided before 1909 are not to be relied upon in considering cases arising under the present act; but it relies upon *Bleistein* v. *Donaldson Lithographing Company*, 188 U. S. 239 (1903), which case arose under the Copyright Act of 1874. That case upheld copyright in circus posters which conveyed information, and which had no function other than as media through which the author spoke to the reader. The *Bleistein* case did not overrule *Baker* v. *Selden*.

The charts in suit are not instruments of communication. Therefore they are not "writings" and their corporate proprietors are not "authors" within the meaning of the copyright clause of the Constitution (Art. 1, Sec. 8, Clause 8) and Section 4 of the Copyright Act (17 U. S. C., sec. 4). The charts in suit are thermometer dials (R. 429); they are not drawings, and therefore do not belong in class 5(i) of the statutory list of copyrightable writings. They are mechanical devices, and the public interest requires that they exhibit the inventive level of patentability before they become monopolizable. In this, plaintiff's charts fail hopelessly. The court below was right in holding that "plaintiff's charts are not the proper subject of copyright" (R. 432).

Morevor, public policy forbids using the copyright law to force owners of machinery to purchase replacement supplies therefor exclusively from the vendor of said machinery.

Davis v. *Comitti*, 52 Law Times Rep. (N. S.) 539, 540 (1885).

Cf., *Morton Salt Co.* v. *The G. S. Suppiger Co.*, 314 U. S. 488 (1942).

International Business Machines Corporation v. *U. S.*, 298 U. S. 131 (1936).

The situation in the recording industry is aggravated by an understanding not to compete in the sale of charts, which is presently in force between the principal instrument manufacturers (R. 103, 351, 354, 359, 362, 365, 368, 371, 375). Petitioner and its "competitors" piously call this "respect [for] the copyrights of our competitors" (R. 375; Petitioner's Brief, p. 14). Such "respect" ignores the doctrine of equitable license, which holds that the purchase of a machine emancipates it from all monopolies upon the machine or any part thereof. The owner of a chattel can no more be restrained from using his property by a copyright than by a patent.

Cf. *Heyer* v. *Duplicator Mfg. Co.*, 263 U. S. 100 (1923).

Petitioner's brief makes no attempt to support its request for review of the trade-mark question, and we submit that such review should be denied regardless of this Court's action on the copyright issue.

Since petitioner does not raise the question of unfair competition, its accusation on that score is gratuitous. The court below pointed out the shabby character of the "evidence" used by petitioner to manufacture a sham case against respondent (R. 435-7).

We submit that the record in this case does not deserve review by this Court, but rather warrants review by the antitrust division of the Department of Justice.

Respectfully submitted,

ALBERT I. KEGAN,
ESTHER O. KEGAN,
Attorneys for Respondent.

(25)

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IN THE

Supreme Court of The United States

OCTOBER TERM, 1943.

TAYLOR INSTRUMENT COMPANIES
Petitioner,

vs.

FAWLEY-BROST COMPANY,
Respondent.

No. 689

PETITION FOR WRIT OF CERTIORARI TO THE CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT BY TAYLOR INSTRUMENT COMPANIES.

BRIEF FOR THE BROWN INSTRUMENT COMPANY AS AMICUS CURIAE.

THE BROWN INSTRUMENT COMPANY,
By BAIR & FREEMAN,
Its Attorneys.

WILL FREEMAN,
C. B. SPANGENBERG,
Of Counsel.

MCCORMICK AND HENDERSON, INC., CHICAGO

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BRIEF FOR THE BROWN INSTRUMENT COMPANY AS AMICUS CURIAE.

This brief for The Brown Instrument Company as *amicus curiae* is limited to a single question involving interpretation of the Copyright Law.

OPINIONS BELOW.

The opinion of the District Court for the Northern District of Illinois, Eastern Division, is published in

56 United States Patent Quarterly 213

and the judgment of said Court appears at R. 409. The District Court found certain "charts" to be the subject matter of copyright and decreed defendant (respondent here) to be an infringer.

The opinion of the Circuit Court of Appeals is not yet officially reported. It appears at R. 428. It is published in

59 United States Patent Quarterly 384.

The Circuit Court of Appeals found the "charts" not to be the subject of copyright protection and reversed the District Court.

JURISDICTION.

The jurisdiction of this Court is invoked under Section 240 of the Judicial Code as amended by Act of February 13, 1925, U. S. C. A., Title 28, Section 347 (a).

STATUTES INVOLVED.

Copyright Act of 1909, Title 17, Sections 4 and 5, Par. (i).

"Section 4. All writings of author included

The works for which copyright may be secured under this title shall include all the writings of an author.

Section 5. Classification of works for registration.

The application for registration shall specify to which of the following classes the work in which copyright is claimed belongs:

* * * * * *

(i) Drawings or plastic works of a scientific or technical character.

* * * * * *

The above specifications shall not be held to limit the subject matter of copyright as defined in section 4 of this title, nor shall any error in classification invalidate or impair the copyright protection secured under this title."

THE QUESTION PRESENTED.

Are "charts" for use with recording instruments or "mechanical devices", the subject of copyright protection?

(a) Do such "charts" constitute "writings" within the meaning of Section 4 of the Copyright Act?

(b) Do such "charts" constitute "drawings" within the meaning of Section 5, Par. (i) of the Copyright Act?

INTEREST OF THE BROWN INSTRUMENT COMPANY.

The Brown Instrument Company is a corporation of Pennsylvania and has its principal place of business in the City of Philadelphia. The Brown Instrument Company for more than twenty-five years has been engaged in the manufacture and sale of automatic recording instruments and charts to be used with recording instruments.

This case with respect to the copyright question raises an issue which reaches far beyond the interests of the adverse parties in the above-entitled cause.

The copyright issue involves consideration as to the protection afforded Authors, whose works are to be used with other mechanical devices. This case involves charts, which are used with recording instruments.

The Brown Instrument Company is one of such "Authors" whose "writings" have heretofore been copyrighted under the Copyright Act, Section 5, Par. (i).

A typical example of the type or kind of charts herein involved is shown by Petitioner's Exhibit B (physical exhibit), R. 66, of the instant case.

The Brown Instrument Company is vitally interested in having this Court determine whether charts are "writings" in accordance with Section 4 of the Copyright Act, and thus come under the further detail classification of "drawings * * * of a scientific or technical character" within Section 5, Par. (i).

The public at large as well as Authors are concerned in the scope of subject matter which may be lawfully copyrighted.

Heretofore and for many years, The Brown Instrument Company has copyrighted such "charts" by duly filing its applications with the Register of Copyrights, of The Library of Congress, and such applications were duly registered by the Register of Copyrights. Since the decision by the Seventh Circuit Court of Appeals, the Register of Copyrights has apparently been left in a state of uncertainty as to what should be done in connection with such applications for copyright protection on charts. A letter of the Register of Copyrights of the Library of Congress is here quoted:

"Office of the
Register of Copyrights
1-7-44

THE LIBRARY OF CONGRESS
Copyright Office
Washington
25, D. C.

Brown Instrument Company
Wayne and Roberts Avenues
Philadelphia 44
Pennsylvania

Attention of C. B. Spangenberg, Esquire

Gentlemen:

Referring to the applications recently received for registration in behalf of The Brown Instrument Company of 'Chart No. 1625T' and 'Chart No. 5414-X,' two copies of each of which were duly received under separate cover:

Before taking further action, it seems desirable to call to your attention for consideration the recent case of Taylor Instrument Companies v. Fawley-Brost Company, reported in the December 11, 1943, number of the United States Patent Quarterly (Vol. 59, pages 384-389), wherein the Circuit Court of Appeals for the 7th Circuit held that a chart for recording temperature is not copyrightable since it is 'a mechanical element of the instrument of which it is an integral part'; that such a chart is as indispensable to the operation of a recording thermometer as are any of the other elements. In other words, that these charts are objects of use rather than objects of explanation, and hence not subject to copyright protection.

If this is good law, then it would seem that the Copyright Office would not be entitled to register charts of this character, and we shall await with interest any comments you may wish to submit. Meantime the material will be held in abeyance under your 'Deposit Account.'

Respectfully
Richard C. DeWolf
Acting Register of Copyrights
By H."

The question here presented has never been passed upon by this Court. Hence the interest of The Brown Instrument Company as an applicant for copyright protection and as an Author.

ARGUMENT.

The charts involved are to be used with recording instruments for making a record. The preparation of these charts by the Author requires a high degree of technical skill and embodies intellectual effort, care and discrimination in a field involving complex mathematical calculations. The charts disclose the results of such intellectual effort, and they, themselves, convey information. A person, versed in scientific or technical matters, can read these charts as he would any other drawing or book. They convey to him information, the type, operating characteristics and range of operation of a recording machine, and the type of additional information he may expect to find upon additional uses of the charts. They, themselves, convey just as much information as a word picture.

These charts are "writings" within the meaning of the Copyright Act. They convey information upon inspection and when ultimately used convey additional information.

Section 5, Par. (i) of the Copyright Act specifically provides a classification in which the charts fall,—that is, charts are drawings of a scientific or technical character.

It thus follows that writings referred to in Section 4 of the Act are all inclusive of many different kinds of intellectual and scientific work on the part of Authors. Drawings of a scientific nature thus come within the general term "writings."

Congress specifically provided that an Author whose writing was in the form of a drawing should be fully protected in such work against unauthorized copying or pirating for a limited period of time, and therefore provided a sub-classification of Section 5, Par. (i), to protect such Authors in their "writings" in the form of drawings.

The chart itself conveys information and because it can be used with a recording instrument does not of itself lessen

or detract from the "work of the Author." When the chart has been prepared, it exemplifies the independent effort of an Author and comes within the domain of the Copyright Act, and as such is entitled to protection.

The use made of the chart should not be the determining factor in whether the "drawing" is a "writing" within the meaning of the Copyright Act. It is clear that charts do constitute "writings" within the meaning of Section 4 of the Copyright Act, and that meaning is clearly supported by the classification of Section 5, Par. (i). Congress could not have meant otherwise in view of the wording of Sections 4 and 5.

CONCLUSION.

It is respectfully submitted that the Petition for Writ of Certiorari should be granted because

(a) The copyright question here presented has never been passed upon by this Court;

(b) Authors such as The Brown Instrument Company should know what its rights are with respect to its writings in the form of drawings (or charts) of a scientific or technical character;

(c) The public who purchases such charts should know what its position may be with respect to copyrighted charts which have heretofore been copyrighted in large quantities by the Petitioner in this case, and by other Authors, such as The Brown Instrument Company; and

(d) The Register of Copyrights of The Library of Congress is now in a state of uncertainty with respect

to the decision of the Seventh Circuit Court of Appeals as to whether or not the decision "is good law."

Respectfully,

THE BROWN INSTRUMENT COMPANY,

By BAIR & FREEMAN,
Its Attorneys.

.....

WILL FREEMAN,
C. B. SPANGENBERG,
Of Counsel.

Chicago, Illinois,
February 7, 1944.